Supreme Court, U.S.
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No. 04-

In the Supreme Court of the United States

JACQUELINE ORLOFF,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Communications Act of 1934, as amended, subjects cellular telephone service providers to regulation as "common carriers." 47 U.S.C. § 332(c)(1)(A). "A 'common carrier' does not make individualized decision, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979)(quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

The United States Court of Appeals for the District of Columbia Circuit held that a common carrier that provides cellular telephone service may make individualized decisions in particular cases whether and on what terms to deal. The Court of Appeals held that common carriers in a competitive market may haggle and do not need to make their services available to similarly-situated customers on a non-discriminatory basis. The questions presented here are:

1. Whether a common carrier, as opposed to a private carrier, may lawfully make individualized decisions as to whether and on what terms to deal with similarly-situated customers.

2. Whether a common carrier, as opposed to a private carrier, may discriminate between similarly-situated customers without a reason that is rationally related to the discrimination.

PARTIES TO PROCEEDING

Petitioner, Jacqueline Orloff, an individual consumer of cellular telephone service in the Cleveland, Ohio area, resides at 4557 Telhurst Road, South Euclid, Ohio 44121.

Respondents, United States of America and the Federal Communications Commission ("FCC" or "Commission"), are the government entities enforcing the opinions complained of.

Verizon Wireless a/k/a New Par was also a party in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., *infra*, 1a) is reported at 352 F.3d 415 (D.C. Cir. 2003). The Memorandum Opinion and Order of the Federal Communications Commission (App., *infra*, 11a) is reported at 17 F.C.C.R. 8987.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 23, 2003. (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Communications Act of 1934 provides, in pertinent part, that "[a] person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is engaged, be treated as a common carrier . . . ." 47 U.S.C. § 332(c)(1). In contrast, Subsection (2) of 47 U.S.C. § 332(c) provides for "non-common carrier treatment of private mobile services."

The Communications Act also states that "[a]ll charges, practices, classifications and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful . . . ." 47 U.S.C. § 201(b).

This Communications Act further provides, in pertinent part, that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . or to make or give any undue or unreasonable preference or advantage to any particular person, [or] class of persons . . . or to subject any particular person [or] class of persons . . . to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

STATEMENT

A. The Growing Importance of Wireless Communications.

Since the first call on a commercial cellular system was made in Chicago, Illinois in 1983, wireless service has grown to include more than 148,000,000 American subscribers. *See* CTIA's Wireless Industry Indices: 1985-2003, http:\\www.wow-com.com/industry stats/surveys. More than 50% of all American men, women and children have a wireless telephone. *Id.; see also In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 8th Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC Case No. 03-150 (July 14, 2003) at ¶59.

Americans pay more than $81 billion each year for wireless service. *Id.* The average subscriber pays $600 per year for cellular service. *Id.* Since 1998, wireless carriers have been able to increase the average monthly bill from $39.88 to $49.40, an increase of more than 25% in an industry with declining marginal costs. *Id.*

B. Congress Distinguished Between Common Carriers and Private Carriers.

Since the very beginnings of regulation in the Communications Act of 1934, Congress distinguished between common carriers and private carriers. *See e.g.*, Title 2 Common Carrier regulations, 47 U.S.C. 201, *et. seq.* Congress noted that that "since a person must be a common carrier for hire to come within this definition, it does not include [any organization] furnish[ing] service under varying arrangements, establishing the service to be rendered, and the terms under which rendered and the charges therefore." H.R. Rep. No. 1850, 73d Cong., 2d Sess., 4 (1934). Indeed, the conference report "noted that the definition does not include any person if not a common carrier in the ordinary sense of the term." H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess., 46 (1934).

Wireless service is also known in the communications industry as "commercial mobile radio service" ("CMRS"). In its first regulations relating to the provision of CMRS, Congress re-emphasized that cellular providers are to be regulated as common carriers and not as private carriers. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(b), 107 Stat. 312 ("OBRA").

As codified at 47 U.S.C. § 332, Congress created two separate distinctions between Subsection 1 requiring the common carrier treatment of every CMRS provider; and Subsection 2 permitting "non-common carrier treatment of private mobile services," such as radio dispatch services. Congress made it clear that "a person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier . . . ." 47 U.S.C. § 332(c)(1). In contrast,

radio dispatch services were held to be a private mobile service and "shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Chapter." 47 U.S.C. § 332(c)(2).

In the 1996 Telecommunications Act, Congress re-emphasized the differences between common carriers and private carriers services when it "recognized the distinction between common carrier offerings that are provided to the public . . . and private services." H.R. Conf. Rep. No. 104-458, at 115 (1996).

Indeed, this Court has recognized that the distinction between a private carrier and a common carrier is that a "common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

C. Congress Also Prohibited Irrational Discrimination Against American Consumers.

In permitting relaxed treatment for wireless providers, Congress specifically reaffirmed the importance of §§ 201 and 202 to individual persons. Although Congress permitted the FCC to forebear from enforcing certain regulations, Congress required that in "prescribing or amending any such regulation, the Commission may not specify [for forebearance] any provision of § 201, 202 or 208 of this title . . . ." 47 USC § 332(c)(1)(A). In any event, even where forebearance is permitted, Congress required the FCC to make a formal finding that such provision was "not necessary in order to insure that the charges, practices, classifications, or regulations for in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory." *Id.* By requiring that the FCC make factual findings that restate the protections of §§ 201 and 202,

Congress eliminated the FCC's ability to repeal *sub silentio* the protections against unfair or discriminatory conduct.

D. Congress Intended to Protect Ordinary Consumers.

Indeed, Congress further prohibited relaxation of any provision that is "not necessary for the protection of consumers." *Id.*

Verizon is a wireless provider in the Cleveland, Ohio market. In addition to its publicly-available prices, Verizon individually negotiates private prices for the sale of its service. Verizon claims the discretion to provide these rates to some consumers, but deny them to others.

Orloff is a consumer in the Cleveland, Ohio market. In 2000, Orloff purchased Verizon service on the PB-200 rate plan. Orloff was not informed of Verizon's lower private prices. She later learned that other customers were able to purchase the exact same Verizon PB-200 rate plan at a lower, individually-negotiated price. When Orloff requested service at the same rates, terms and conditions made available to others, Verizon refused. When Orloff asked for the reason why she was charged more than others for the same service, Verizon refused to provide a reason.

Orloff brought this suit against Verizon alleging that Verizon, as a common carrier, had engaged in individual negotiations permitted only by a private carrier. Orloff alleged that Verizon's decision to conduct its business as a private carrier, rather than as a common carrier as required by Congress, was an unreasonable practice prohibited by § 201.

Orloff also alleged that Verizon violated § 202 by charging her discriminatory prices without a reason. At a minimum, Orloff expected that Verizon would be required to produce a reason why Verizon charged Orloff more for the same service than it charged other consumers subject to the same market conditions.

E. Verizon Stipulated That It Was Required to Act as a Common Carrier, But That It Was Not in Fact Conducting Its Business as Such.

During the course of the litigation below, there were no material disputes of fact. Verizon stipulated that it was required to act as a common carrier. Without any sense of contradiction, and contrary to this Court's decision in Midwest Video, Verizon also stipulated that it made individualized decisions as to particular customers whether and on what terms to deal. Rather than hold itself out to the public as offering service indifferently to all comers, Verizon informed the FCC and Orloff that Verizon reserved the right to refuse service to Orloff unless she paid rates that were higher than rates charged to others for the same service for which she otherwise qualified. Verizon stipulated that its current policy and practice is to treat customers differently, not indifferently.

F. Verizon Stipulated That It Had No Reason for Discriminating Against Orloff.

Verizon freely agreed that it charged Orloff more for the PB-200 plan than it charged other customers on the same rate plan, at the same time, under the same market conditions. Verizon and Orloff agreed that Orloff paid more than others for the same service, at the same time, in the same market. Orloff requested again that Verizon provide a

rational basis for selecting some customers, but not Orloff, to receive a discount.

Verizon responded that Verizon was not a dominant carrier and that Cleveland was a competitive market.

Orloff noted that if both she and the preferred customer were subject to the same market conditions, then this could not serve as a rational basis for choosing between them. As a matter of simple logic, two customers that have the same attribute cannot be distinguished on the basis of the common attribute.

G. The Opinions Below.

The FCC agreed that Verizon was required to be a common carrier, but declined to find any substance in the term. Next, the FCC applied the three-step, burden-shifting test for unreasonable discrimination. *Orloff v. Vodafone AirTouch Licenses LLC*, 17 F.C.C.R. 8987, (FCC 2002). The FCC made a factual finding that Verizon had discriminated against Orloff by selling her similar wireless service at discriminatory rates. However, the FCC found that Verizon's discrimination was reasonable solely because the Cleveland market was competitive as to all customers. Accordingly, the FCC determined that Verizon's individualized decision-making did not violate § 201 and that its discrimination did not violate § 202.

On appeal, the District of Columbia Circuit did not discuss Orloff's claim that individualized decision making by a common carrier violates § 201. The Orloff Court analyzed only Orloff's discrimination claim under § 202.

In discussing Orloff's discrimination claim, the Orloff Court recognized this Court's opinion in *Midwest Video* that

common carriers are barred from individualized negotiation. Orloff argued that, under *Midwest Video*, a CMRS provider, because it is a common carrier, cannot individually negotiate rates. The Court of Appeals wrote that "Orloff's point is a fair one." 352 F.3d at 419 (App., 6a).

Nonetheless, the Orloff Court determined that this Court's holding in *Midwest Video* was no longer valid in the CMRS context. The Orloff Court reasoned that discrimination under § 202 could only exist where there was a tariff filing requirement under § 203. Without analyzing Congress' direction that the FCC could not forebear from enforcing § 202, the Orloff Court held that the FCC's decision to detariff wireless providers also eliminated certain obligations under § 202. In essence, the Orloff Court removed CMRS providers from the class of companies required by Congress to act as common carriers.

Instead, the Orloff Court focused on only some of the language in 202. Although § 202 applies to "persons," the Orloff Court held that, in the CMRS context, the discrimination provisions would only extend to protect "particular demographic group[s]." *Id.* at 420 (App., 6a-7a). The Orloff Court refused to analyze Orloff's claim that she was unreasonably discriminated against as an individual person. Finally, the Orloff Court determined that Verizon's broad policy of negotiation was reasonable because the Cleveland market was generally competitive.

After four years of litigation, Verizon has never produced any reason that distinguishes Orloff, who did not get a discount, from other customers who did get a discount. As the Orloff Court recognized, "the Commission allowed Verizon to offer [discounts] to some customers and not

others, even though there was no discernible difference between the two groups." *Id.* at 420-421 (App., 9a).

I. REASONS FOR GRANTING THE PETITION

A. The Orloff Court's Decision Conflicts with This Court's Opinion in *Midwest Video* and With the Opinions of Other Circuits and Other Courts. The Orloff Court Incorrectly Distinguished This Court's Opinion in *Midwest Video*, and Thereby Removed the Congress' Requirement That CMRS Providers Must Be Common Carriers.

The Orloff Court's decision conflicts with this Court's Opinion in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). In *Midwest Video*, this Court held that a "common carrier does not 'make individualized decisions in particular cases, whether and on what terms to deal.'" *Id., quoting National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976)("NARUC I"). Moreover, Verizon and the FCC conceded that Verizon claims the right to make individualized decisions in particular cases, whether and on what terms to deal. The Orloff Court in its decision notes that its Opinion is in conflict with *Midwest Video* and concedes that "Orloff's point is a fair one." *Orloff*, 352 F.3d at 419 (App., 6a).

Recognizing its conflict with this Court's opinion in *Midwest Video*, the Orloff Court attempted to distinguish it. *Id.* The Orloff Court claimed that the common carrier requirements set forth in §§ 201 and 202 "have been premised upon the tariff-filing requirements of the § 203." *Id.* Thus, the Orloff Court has chosen to disregard this Court's precedent because it believed that the inapplicability

of § 203's tariff-filing requirement also repealed Congress' requirement that Verizon act as a common carrier.

The Orloff Court's rationale for distinguishing this Court's Opinion in *Midwest Video* is historically wrong. The tariff-filing requirement was eliminated in 1994. *See In Re Implementation of §§ 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 F.C.C.R. 1411, 1478 (1994) ("CMRS 2nd Report and Order"). Yet, two years later, Congress reemphasized that although the FCC could forebear from any other requirement, it could **not** forebear from enforcing the non-discrimination provisions of §§ 201 and 202. 47 U.S.C. § 160(a). Thus, the Orloff Court's belief that the removal of the tariff-filing requirement affected the application of the non-discrimination requirement is simply incorrect. Moreover, there is no historical precedent for the claim that Congress eliminated the common carrier requirements. Congress required these companies to be common carriers even after the removal of the tariff requirement. Thus, the Orloff Court's attempt to avoid its conflict with this Court's Opinion in *Midwest Video* is unavailing.

Numerous other federal courts have held that the defining characteristic of a common carrier is that such company hold itself out to the public indifferently and not individually negotiate, in particular cases, whether and on what terms to deal. For example, the District of Columbia Circuit held that "a common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal." *NARUC I*, 525 F.2d at 641. In fact,

other than the decision by the Orloff Court, the decisions of the federal courts have been consistent.[1]

B. Under The Orloff Opinion, Common Carriers Can Now Discriminate Against the Public Without Having to Show a Rational Basis for Such Discrimination.

There is "an absolute obligation to prevent" unreasonable discrimination "regardless of the needs of particular users or other policy considerations." *Western*

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[1] Such case law includes *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 93 (1973); *State of Washington ex.rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207 (1927); *United States v. California*, 297 U.S. 175 (1936); *Howard v. America Online, Inc.*, 208 F.3d 741, 752 (9th Cir.), *cert. denied*, 531 U.S. 828 (2000) (dismissing RICO claims and noting that "a common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal"); *Florida Power & Light Co. v. F.E.R.C.*, 660 F.2d 668, 674 (5th Cir. 1981), *cert. denied sub nom*, 459 U.S. 1156 (1983) (holding that a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases as to whether and on what terms to serve); *Trailways of New England v. Cab*, 412 F.2d 296, 931 (1st Cir. 1969) ("the right to be treated fairly and nondiscriminatorily by a common carrier . . . is one derived from the common law of common carriers"); *Semon v. Royal Indemnity Co.*, 279 F.2d 737 (5th Cir. 1960); *MediaOne Group, Inc. v. County of Henrico, Va.*, 97 F. Supp. 2d 712, 716 (E.D. Va. 2000), *aff'd*, 257 F.3d 356 (4th Cir. 2001)(noting that repealed cable access requirements had previously made cable stations common carriers because they deprived "the firm of the right held by a private carrier to make individualized decisions, in particular cases, whether and on what terms to deal"); *That's Entertainment of Illinois, Inc. v. Centel Videopath, Inc.*, 1993 WL 13011588 (N.D. Ill. Dec. 9, 1993) (noting that in determining whether cable provider was a common carrier, the "allegations in the complaint do not reveal whether Centel makes individualized decisions in particular cases, whether and on what terms to deal with public customers, or whether it did so with plaintiffs").

Union Inter., Inc. v. FCC, 568 F.2d 1012, 1017 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978). The D.C. Circuit has held that:

> The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with "any." It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice. Moreover it is quite clear that this is not a matter of chance statutory semantics. It is a matter of public interest and policy. The money difference in price is the core of the proscription. Equal prices for like services is in itself a matter of public interest. The prohibitory phrases were not in contravention of or an exception to, the opening policy declarations of the statute, but were pursuant to and in furtherance of those declarations. The Supreme Court has spoken many times on this subject.

American Trucking Assoc., Inc. v. FCC, 377 F.2d 121, 130-31 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

The FCC held that Verizon did, in fact, discriminate against Orloff:

> ***We conclude that Orloff has satisfied the first two steps of this section 202(a) inquiry.*** First, the parties agree that, for purposes of this proceeding, the Commission may assume that the "like" communication service at issue

> is single-line cellular service purchased by a non-business user. Second, we conclude that Defendants ***treated Orloff differently*** than they treated other customers purchasing like service, given the parties' stipulations that (1) a customer who received a concession obtained service at a lower price than that paid by a customer who received service under the same rate plan or promotion but who did not receive that concession; and (2) ***some customers in the Cleveland, Ohio MSA on the same rate plan as Orloff received some types of sales and retention concessions that Orloff did not receive.***

Opinion at ¶ 15 (emphasis added) (App., 17a). This Opinion was upheld by the Court of Appeals.

Thus, the only remaining question is whether the Orloff Court required Verizon to put forward a reason which explains the disparity between its treatment of Orloff and other customers in the same Cleveland market.

A difference in price is not unreasonable if there is a "'neutral, rational basis underlying [the disparity].'" *MCI Telecomm. Corp. v. FCC*, 917 F.2d 30, 41 (D.C. Circ. 1990)(quoting *National Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984)). *See also Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 844 (9th Cir. 2002).

As the Orloff Court found, "here the Commission allowed Verizon to offer concessions to some customers and not others, even though there is no discernable difference between the two groups." *Orloff*, 352 F.3d at 420-421.

The Orloff Court conceded that there were no differences between Orloff and any other customers. Instead, the Orloff Court attempted to analyze the Cleveland market and the market power, if any, of Verizon. This procedure misanalyses and misapplies the burden shifting test, as the Orloff Court recognized "there is no discernable difference" between Orloff and other customers that received lower prices. Orloff, like every other customer, faced the same competitive options. Orloff, like every other customer, faced the same issues of provider dominance or competition or filing-filing. Yet, Verizon picked some of those customers to receive lower prices and not others.

Rather than conducting the proper analysis of whether there was a difference between those who received discounts and those who did not, the Orloff Court concluded that there was no difference. Instead, it looked at whether the non-discrimination rule should apply at all, not whether there was a reason for selecting Orloff and not others.

C. The Orloff Court Ignored § 202's Prohibition Against Discrimination Against Individuals.

Section 202 specifically prohibits any unreasonable discrimination between "persons." 47 USC § 202. In discussing the remaining duties of Verizon, the Orloff Court held that:

> "As common carries under § 332, CMRS providers still have duties. They cannot – as the Commission put it – refuse "to deal with any segment of the public whose business is the type normally accepted." *Orloff* 17 F.C.C.R. at 8997. They cannot decline "to serve any particular demographic group (*e.g.*, customers who are of a certain race or income

> bracket)." *Id.* Nothing in the record indicated that Verizon fell short on either count."

Orloff, 352 F.3d at 420 (App., 7a-8a). Thus, the Orloff Court failed to conduct any analysis regarding discrimination as between individuals. The Orloff Court's opinion is in conflict with the cases cited above because it limited its analysis to discrimination between groups despite the plain language of 202.

II. THE ORLOFF COURT'S DECISION TO DISTINGUISH THIS COURT'S LEAD CASE WHICH DEFINES "COMMON CARRIERS" WILL CREATE UNCERTAINTY IN MANY AREAS OF THE LAW.

The ramifications of the Orloff Court's decision extend well beyond a single CMRS customer in a single market. In fact, the concept of common carriage extends to other industries such as airlines, railroads, and trucking. While those industries have been largely deregulated, they have not been relieved of their obligations that are concomitant with the designation as "common carriers." Each of those industries is competitive.

The logical extension of the D.C. Circuit's decision will mean that airlines, for example, can begin negotiating with their passengers without regard to the concepts of unlawful discrimination. For example, an airline may fulfill its duties as a common carrier by having hundreds of public rates which are publicly available on a first-come, first-served basis. Indeed, these rates can change on an hourly basis.

The important difference is that, until the Orloff Court's opinion, these common carriers could not create private prices. Under the Orloff Court's decision, these common

carriers can eliminate public pricing and engage in individualized negotiations with every customer.

Likewise, despite the different concepts of common and private carriage in the trucking industry, the distinctions will now be meaningless. After this decision, trucking companies can feel free to individually negotiate different rates with similarly-situated customers.

The jurisprudence of common carriage has stood for over 100 years and has, until today, been consistent: common carriers cannot "haggle" or otherwise negotiate rates that are not universally made available to all similarly-situated customers. It is important for this Court to accept this case to avoid a situation where the concept of common carriage becomes meaningless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2004

APPENDICES

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

Jacqueline ORLOFF, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

New Par and Verizon Wireless, Intervenors.

No. 02-1189

Argued Oct. 7, 2003.
Decided Dec. 23, 2003.

On Petition for Review of an Order of the Federal Communications Commission.

Randy J. Hart argued the cause for petitioner. With him on the briefs was Mark D. Griffin.

Richard K. Welch, Counsel, Federal Communications Commission, argued the cause for respondent. With him on the brief were Robert B. Nicholson and Steven J. Mintz, Attorneys, U.S. Department of Justice, Jane E. Mago, General Counsel, Federal Communications Commission, and John E. Ingle, Deputy Associate General Counsel. Daniel M. Armstrong, Associate General Counsel, entered an appearance.

Kathleen M. Trafford argued the cause for intervenors. With her on the brief were Daniel W. Costello and Kenneth D. Patrich.

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

In order to gain new business in the Cleveland, Ohio, area, Verizon Wireless negotiated with prospective customers and offered them special deals. Jacqueline Orloff, a former Verizon customer, filed a complaint with the Federal Communications Commission, claiming that Verizon's practice of granting "sales concessions" violated the non-discrimination clause of 47 U.S.C. § 202(a) and Verizon's duty as a common carrier. Her petition for judicial review challenges the Commission's determination that Verizon's granting of sales concessions was a reasonable response to competitive conditions in the Cleveland market, not "unjust or unreasonable" discrimination in violation of § 202(a).

I.

Verizon Wireless provided service to Orloff from February 1999 until February 2001. The Commission found that during this period, the Cleveland-area mobile phone market was highly competitive. Five facilities-based providers and numerous resellers vied for business. The providers – none of whom had market power – offered offered an assortment of plans, which they promoted with advertising and special offers.

Like its competitors, Verizon had several standard rate plans and regularly engaged in special advertising promotions, offering airtime minutes or additional services at no extra charge. Verizon also authorized its salespeople to

give concessions to potential customers if needed to "close the deal." These concessions might include free minutes, a free feature like voice mail or call forwarding, a discounted cell phone, or a one-time monetary credit. Verizon did not advertise the availability of sales concessions (or of "retention concessions" for existing customers, which Orloff no longer challenges). The concessions were offered at the salesperson's discretion to prospective customers who negotiated – haggled – for a better deal.

In February 1999, Orloff – who lives in the Cleveland area – agreed to a two-year mobile phone contract with Verizon. She purchased an advertised plan and received several concessions: a discounted phone, free activation, three months of free weekend use, and a credit worth half her monthly fee for six months. Five months into the two-year contract, Verizon agreed to allow Orloff to switch to another plan, at which time Verizon gave her a billing credit as a retention concession.

In February 2000, Orloff and three others sued Verizon in the United States District Court for the Northern District of Ohio. The suit was a putative class action on behalf of at least 50,000 Ohio residents who bought Verizon mobile phone service in the previous two years. The complaint alleged that Verizon, in giving sales concessions, treated similarly situated customers differently, in violation of § 202(a) of the Communications Act. The district court referred "the matter" to the Commission and stayed further proceedings, although the court did not specify which issues it thought were within the Commission's primary jurisdiction. *Orloff v. Vodafone Airtouch Licenses LLC,* Case No. 1:00 CV 421 (N.D.Ohio May 30, 2000).

To implement the court's order, Orloff filed a complaint with the Commission under § 208 of the Act. (The

complaint was on behalf of Orloff alone, not the class identified in the district court.) The Commission ruled that in a market as competitive as Cleveland's, market forces protected consumers from unreasonable discrimination. *See Orloff v. Vodafone AirTouch Licenses LLC d/b/a Verizon Wireless*, 17 F.C.C.R. 8987, 8996, 2002 WL 992190 (2002). Dissatisfied customers could switch providers, and it was "unlikely that a carrier would have an incentive to engage in unreasonable discrimination where such conduct would result in a loss of customers." *Id.* at 8996-97. The Commission therefore decided that although, in terms of charges and services, Verizon treated Orloff differently than some other similarly situated customers, Verizon did not engage in unjust or unreasonable discrimination in violation of § 202(a). *Id.* at 8995. Orloff also claimed that Verizon's practice violated the command of § 201 that all "charges, practices, classifications, and regulations" of communications common carriers be "just and reasonable." The Commission held that if a practice is just and reasonable under § 202, it must also be just and reasonable under § 201. *Id.* at 8999.

II.

Congress modeled the Communications Act of 1934 on the Interstate Commerce Act, the "great purpose" of which "was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination." *New York, New Haven & Hartford R.R. v. ICC*, 200 U.S. 361, 391, 26 S.Ct. 272, 276-77, 50 L.Ed. 515 (1906). The "centerpiece" of Title II of the Communications Act was the requirement, set forth in § 203, that communications common carriers file their rates with the Commission and charge customers only those rates.

MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 220, 114 S.Ct. 2223, 2226, 129 L.Ed.2d 182 (1994). As in the Interstate Commerce Act, "rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges" by common carriers. *Id.* at 230, 114 S.Ct. at 2231.

A provider of CMRS (commercial mobile radio service) such as Verizon is "a common carrier" subject to Title II of the Communications Act. 47 U.S.C. § 332(c)(1)(A). But Congress gave the Commission authority to render § 203 inapplicable to CMRS and, in 1994, the Commission exercised that authority. *See* 47 C.F.R. § 20.15. For CMRS, the Commission thereby dissolved what the Supreme Court described as the "indissoluble unity" between § 203's tariff-filing requirement and the prohibition against rate discrimination in § 202. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440, 27 S.Ct. 350, 355, 51 L.Ed. 553 (1907). In exempting CMRS providers from § 203, the Commission explained that "market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power." *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 F.C.C.R. 1411, 1478, 1994 WL 76285 (1994) ("*CMRS Second Report and Order*"). A carrier's success "should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs – and not by strategies in the regulatory arena." *Id.* at 1420. Although the Commission was later given the authority, in the 1996 Telecommunications Act, 47 U.S.C. § 160(a), to "forbear from applying any regulation or provision" of the Communications Act to a telecommunications carrier, it has not exempted CMRS from § 201 or § 202.

In the past, the question whether a common carrier engaged in "unjust or unreasonable discrimination" in violation of § 202 was largely determined by reference to the carrier's tariff. If the carrier and the customer negotiated a special rate, different than that set forth in the rate under § 203, a finding of discrimination usually followed. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990). In the new regime, however, this obviously cannot be the measure of what constitutes "unjust or unreasonable discrimination." CMRS providers do not file tariffs; in fact, the Commission has forbidden them from doing so. 47 C.F.R. § 20.15(c). How then does one determine whether such a carrier has engaged in unjust or unreasonable discrimination in violation of § 202?

One might say that whenever Verizon charges one customer less than its publicly advertised rates it engages in unreasonable discrimination against all other similarly-situated customers, in violation of § 202. This is Orloff's main argument. Setting rates by negotiation, Orloff contends, is inconsistent with Verizon's designation – in § 332 – as a "common carrier" because a "common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701, 99 S.Ct. 1435, 1442, 59 L.Ed.2d 692 (1979) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C.Cir.1976) ("*NARUC I*")); *see, e.g., U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329, 1332-33 (D.C.Cir.2002); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C.Cir.1999).

Orloff's point is a fair one, but we do not believe it exposes an error in the Commission's decision. The traditional, common law definition of a communications common carrier, reflected in the cases just cited, was

employed, "to draw a coherent line between common and private carriers," *NARUC I*, 525 F.2d at 642, which is how the Supreme Court used the definition in *Midwest Video*. When the common carrier designation fit, the regulatory consequences depended upon the requirements set forth in Title II. Much of "the Communications Act's subchapter applicable to Common Carriers, *see* 47 U.S.C. §§ 201-228, . . . [had been] premised upon the tariff-filing requirement of § 203." *MCI Telecomms.*, 512 U.S. at 230, 114 S.Ct. at 2231. The Commission reviewed and approved rates and determined what level of profits the regulated carrier would earn. The carrier had to file its rates and make them publicly available; and it could not charge different rates without making a new filing and then waiting for a specified period of time (120 days under § 203(b)(1)). *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1359-61 (1998). All of that has changed for CMRS, at least in the Cleveland area. Rates are determined by the market, not the Commission, as are the level of profits. With § 203 no longer applicable, there is no statutory provision even requiring that the carrier publicly disclose any of its rates, although competition will force it to do so. And if Verizon wishes to change its advertised rates, or terms of service, it is free to do so without Commission approval and without waiting even for a moment. It may, for instance, run a commercial in the morning offering prospective customers a free cell phone, revoke the offer that afternoon, and then offer a cell phone for half price on the following day.

As common carriers under § 332, CMRS providers still have duties. They cannot – as the Commission put it – refuse "to deal with any segment of the public whose business is the 'type normally accepted.'" *Orloff*, 17 F.C.C.R. at 8997. They cannot decline "to serve any particular demographic group (*e.g.* customers who are of a certain race or income

bracket)." *Id.* Nothing in the record indicated that Verizon fell short on either count.

Because the current system bears so little resemblance to the paradigm that existed prior to the time the Commission, with the blessing of Congress, began deregulating CMRS, we agree with the Commission that the legality of Verizon"s sales concessions practice depends not on the company's designation as a common carrier, but on § 202 (and § 201). If "a carrier unreasonably discriminated against rural customers, who lacked adequate choice of providers, in favor of urban customers," or if "a CMRS market were inadequately competitive" or if there were other market failures limiting "consumers' abilities to protect themselves, Section 202 could be implicated." *Id.* at 8997-98. But the Commission emphasizes that § 202 prohibits only *unjust* and *unreasonable* discrimination in charges and service. Orloff is therefore not entitled to prevail merely by showing that she did not receive all the sales concessions Verizon gave to some other customers – that, in other words, Verizon engaged in discrimination. Verizon may still show that the difference in treatment was reasonable. *See id.* at 8993-94.

With respect to the Commission's interpretation of § 202 as applied to CMRS, the "generality of these terms" – unjust, unreasonable – "opens a rather large area for the free play of agency discretion, limited of course by the familiar 'arbitrary' and 'capricious' standard in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." *Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C.Cir.1996). In Orloff's view the Commission acted arbitrarily and capriciously because it departed from precedent without giving an adequate explanation. She points out that the Commission and this court have allowed common carriers to charge customer-specific rates only if they offered the same terms to other,

similarly situated customers. *See, e.g.*, *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 37-38 (D.C.Cir.1990); *In re Panamsat Corp. v. Comsat Corp.*, 12 F.C.C.R. 6952, 6965-66, 1997 WL 265158 (1997); *In re Competition in the Interstate Interexchange Marketplace*, 10 F.C.C.R. 4562, 4566, 1995 WL 65511 (1995). Yet here the Commission allowed Verizon to offer concessions to some customers and not others, even though there is no discernible difference between the two groups.

Once again, the cases on which Orloff relies deal with dominant carriers whose charges were regulated through § 203's tariff-filing requirement. Allowing those carriers to grant discriminatory concessions would have undermined the regulatory scheme then in effect. Filed tariffs are pointless if the carrier can depart from them at will. Permitting a dominant carrier to discriminate would give it the power to control its customers" economic fates, thus defeating one of the main purposes of common carrier regulation. *See ICC v. Baltimore & Ohio R.R.*, 145 U.S. 263, 276, 12 S.Ct. 844, 847, 36 L.Ed. 699 (1892). But as the Commission reasoned, the situation in the Cleveland-area mobile phone market is distinguishable. Not only are there no filed rates, but also neither Verizon nor any other CMRS provider is dominant. Customers dissatisfied with Verizon's charges or service may simply switch to another provider. As the Commission also ruled, Orloff is not in a position to argue that some potential customers may be unaware that if they haggle with Verizon, they may get a better deal. "Orloff availed herself of the benefits of haggling, receiving numerous concessions from [Verizon] on two occasions." *Orloff*, 17 F.C.C.R. at 8998.

In considering whether Verizon justified its sales concession practices as reasonable, the Commission was "entitled to value the free market, the benefits of which are well-established." *MCI WorldCom v. FCC*, 209 F.3d 760,

766 (D.C.Cir.2000). Haggling is a normal feature of many competitive markets. It allows consumers to get the full benefit of competition by playing competitors against each other. Here Verizon has adopted the practice as a competitive marketing strategy. Consumers, including Orloff, can only benefit.

Orloff objects that the Commission, rather than focusing on the nature of the CMRS market in the Cleveland area, should have compared the deal she struck with Verizon with the concessions Verizon made for others. Once Verizon negotiates a particular concession with one customer, Orloff says it must offer the same concession to all customers. This ratcheting effect would, as a practical matter, have one of two effects. Either Verizon would end its concessions practice altogether, rendering its advertised rates analogous to tariffs, or it would have to devise some sort of tracking system to identify each customer concession resulting from negotiation. The Commission, which is expert in these matters, found the latter prospect unduly burdensome. *Orloff*, 17 F.C.C.R. at 8998-99. As to the former, the Commission properly determined that Verizon's concessions practice benefitted consumers and was therefore reasonable under § 202. By giving concessions, Verizon could "respond immediately to changes in the marketplace and to individual customer demand when existing plans and promotions were inadequate." *Id.* On the other hand, accepting Orloff's arguments would harm consumers and would be contrary to Congress' clearly articulated policy in favor of competition in telecommunications services. *See WorldCom, Inc. v. FCC*, 238 F.3d 449, 454 (D.C.Cir.2001).

The petition for review is denied.

APPENDIX B

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

JACQUELINE ORLOFF, COMPLAINANT,

v.

VODAFONE AIRTOUCH LICENSES LLC, D/B/A VERIZON WIRELESS,

File No. EB-01-MD-009

AND

NEW PAR, DEFENDANTS.

FCC 02-144

Adopted: May 13, 2002

Released: May 16, 2002

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the formal complaint that Jacqueline Orloff ("Orloff") filed against Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, and its affiliate, New Par, [FN1] pursuant to a primary jurisdiction referral and section 208 of the Communications Act of 1934, as amended ("Act"). [FN2] In short, Orloff's complaint alleges that Defendants violated sections 201 and 202 of the Act by offering discounts and other inducements to certain customers taking service under Defendants' wireless calling plans that Defendants did not

make available to Orloff. [FN3] We find that Orloff has not established that Defendants' challenged practices were unreasonably discriminatory, in violation of section 202(a) of the Act, or unjust and unreasonable, in violation of section 201(b) of the Act.

II. BACKGROUND

A. The Parties

2. Orloff is an individual consumer of cellular telephone service in the Cleveland, Ohio area. [FN4] At all relevant times, New Par was licensed and furnished service as a commercial mobile radio service ("CMRS") provider in the Cleveland, Ohio, market. [FN5] New Par is a general partnership in which Verizon Wireless (VAW) LLC is the majority partner. [FN6]

B. State of Competition in the Cleveland Ohio, CMRS Market

3. For purposes of adjudicating Orloff's complaint, the relevant period is January 1, 1999 through February 9, 2001, because it was during this period that Orloff negotiated, purchased, and received cellular service from Defendants. [FN7] Moreover, the relevant geographic market is the Cleveland, Ohio metropolitan statistical area ("MSA"), [FN8] because that is where Orloff resided and sought CMRS service from Defendants. [FN9]

4. During the relevant period, consumers seeking CMRS service in the Cleveland, Ohio MSA could choose between two cellular providers (New Par and GTE Mobilnet), two personal communications service ("PCS") providers (Ameritech and AT&T), and one enhanced specialized mobile radio ("SMR") provider (Nextel). [FN10]

In addition to these five facilities-based providers, various resellers also served the market. [FN11]

5. These providers offered to consumers many different types of service packages, which combined a variety of features such as unlimited weekend calling, free long distance, voice mail, text messaging, no activation fees, extended geographic coverage, and discounted additional lines. [FN12] In addition, these providers regularly designed new offerings to attract customers to their service, including plans with significant bundled minutes and less restrictive terms and conditions. [FN13] Moreover, the providers frequently presented special promotions to consumers, including reduced activation fees and free or discounted phones and automobile battery chargers. [FN14] The providers extensively advertised these plans and promotions, highlighting rates, terms, conditions, and quality of service. [FN15]

C. Defendants" Service Offerings

6. In the Cleveland, Ohio CMRS market, Defendants provided to consumers various standard rate plans, as well as regular promotions, which included additional incentives to purchase their service. [FN16] Many of Defendants' rate plans and promotions included bundles of airtime minutes as part of monthly service or extra features at no additional charge. [FN17]

7. Defendants also authorized their personnel to depart from standard rate plans and promotions by offering added inducements to attract new customers or retain existing customers. [FN18] Defendants called these inducements "sales concessions" (for new customers) and "retention concessions" (for existing customers). [FN19] Examples of these concessions include a one-time monetary credit, minutes of air time added to a plan's or promotion's bundle

of minutes, the free use of some feature (e.g., voice mail or call forwarding) for a period of time, and equipment or an equipment discount or rebate. [FN20] Concessions resulted in the customer obtaining service at a price lower than that paid by another customer who received service under the same rate plan or promotion but who did not receive a concession. [FN21]

8. Defendants empowered their sales agents and customer care representatives to use their discretion in determining whether to offer a particular concession to a particular customer. [FN22] Thus, Defendants decided to grant a concession (as well as the amount of a concession) to any particular customer on an "individualized basis." [FN23] Defendants" personnel generally did not volunteer to consumers information about the potential for obtaining concessions. [FN24] Rather, a consumer generally could learn about and perhaps obtain a concession only as a result of negotiating (i.e., haggling) with a representative of Defendants. [FN25] Defendants did not require their personnel to maintain records regarding the granting of concessions. [FN26]

9. Defendants also provided "Association" and "Government" rate plans in 1999, which were available to members of qualifying associations (e.g., bar associations, chambers of commerce, boards of realtors) and governmental entities/employees, respectively. [FN27] On some occasions, Defendants allowed individuals who were not members of qualifying associations or governmental entities nonetheless to receive the Association or Government rates. [FN28]

10. On February 23, 1999, Orloff purchased cellular service from Defendants under an advertised rate plan. [FN29] Five months into her two-year contract, Orloff switched to another of Defendants' advertised rate plans, on

which she remained until she terminated service on February 6, 2001. [FN30] Orloff received sales concessions at the time she took service under the initial plan, and she received a retention concession at the time she switched to the subsequent plan. [FN31] Nevertheless, during the relevant period, customers in the Cleveland, Ohio market who were on the same rate plan as Orloff received certain sales and retention concessions that Orloff did not receive. [FN32]

D. The Federal District Court Litigation

11. On February 11, 2000, Orloff and three other individuals filed a putative class action lawsuit against Defendants in the United States District Court for the Northern District of Ohio. [FN33] The district court complaint alleges that Defendants violated section 202(a) of the Act by charging different prices to similarly-situated customers for the same service. [FN34] Pursuant to the referral to the Commission, granted at Defendants' request prior to the initiation of discovery, the District Court stayed the underlying lawsuit until the Commission determines whether Defendants' conduct violates the Act. [FN35]

E. The Instant Proceeding

12. In the Complaint filed with the Commission, Orloff alleges that Defendants' "policy and practice of secret, selective, and standardless discounts which are negotiated individually with preferred customers" violates sections 201 and 202 of the Act. [FN36] Specifically, the Complaint avers that Defendants acted in an unreasonable and discriminatory manner, because they failed to make available to Orloff (or to advise her of the existence of) more favorable rate plans and concessions that Defendants offered to other similarly-situated customers. [FN37] The Complaint asks the Commission to declare Defendants' acts unlawful. [FN38] Assuming favorable rulings from the Commission, the

Complaint further indicates that Orloff will pursue a claim for damages in the District Court, rather than at the Commission. [FN39]

13. In their Answer, Defendants assert that Orloff has not demonstrated that a "nondominant carrier in a competitive market [is] able to impose unreasonable or discriminatory pricing." [FN40] The Answer further argues that, even assuming Orloff's legal theory regarding discrimination by a non-dominant carrier is correct, Orloff has not demonstrated that, as a factual matter, she is entitled to relief, because she has not established that any particular customer was charged less than she was for like service and because she received concessions from Defendants. [FN41]

III. DISCUSSION

A. Defendants' Concessions Were a Reasonable Response to Competition in the Cleveland, Ohio CMRS Market.

1. Defendants' Concessions Were Not Unreasonably Discriminatory Under Section 202(a) of the Act.

a. Legal Standard

14. Section 202(a) of the Act makes it unlawful for any common carrier to discriminate unjustly or unreasonably among customers in its provision of "like communication service." [FN42] The Commission and the courts have held that a three-step inquiry is required to determine whether a violation of section 202(a) has occurred: (1) whether the services at issue are "like"; (2) if they are, whether there are differences in the terms and conditions pursuant to which the services are provided; and (3) if so, whether the differences are reasonable. [FN43] When a complainant establishes the first two components, the burden of persuasion shifts to the

defendant carrier to justify the discrimination as reasonable. [FN44]

b. Likeness of Service and Difference in Treatment

15. We conclude that Orloff has satisfied the first two steps of the section 202(a) inquiry. First, the parties agree that, for purposes of this proceeding, the Commission may assume that the "like" communication service at issue is single-line cellular service purchased by a non-business user. [FN45] Second, we conclude that Defendants treated Orloff differently than they treated other customers purchasing like service, given the parties" stipulations that (1) a customer who received a concession obtained service at a lower price than that paid by a customer who received service under the same rate plan or promotion but who did not receive that concession; [FN46] and (2) some customers in the Cleveland, Ohio MSA on the same rate plan as Orloff received some types of sales and retention concessions that Orloff did not receive. [FN47] Accordingly, we turn to the question of whether Defendants have satisfied the third step of the section 202(a) inquiry - i.e., whether their different treatment of Orloff was reasonable.

c. Reasonableness of the Different Treatment

16. Defendants contend that the existence of vigorous competition in the Cleveland, Ohio CMRS market rendered individualized concessions and haggling reasonable. [FN48] Defendants characterize their concessions practices as a means of enabling a non-dominant carrier to keep existing customers and to obtain new customers by quickly meeting the offers of competitors. [FN49] According to Defendants, they made concessions in a nondiscriminatory manner, because no customers were guaranteed a concession, and any concessions that Defendants gave resulted from individual negotiation initiated by the customer (i.e., haggling). [FN50]

Thus, Defendants maintain that the determinative factor was whether a customer haggled: "[A]ll customers . . . could trigger a competitive response from [Defendants], and would be equally likely to be offered or not offered a concession." [FN51]

17. Orloff argues that the presence of competition does not justify Defendants" concessions practices, [FN52] and that competition is irrelevant when customers do not have access to sufficient information regarding alternative offerings. [FN53] Moreover, Orloff asserts that Defendants granted concessions for any reason or no reason at all, not because they carefully analyzed economic factors attendant to particular transactions. [FN54] Thus, Orloff highlights Defendants' failure to keep any records allowing a comparison of different customers and the reasons concessions were, or were not, given. [FN55]

18. Defendants have demonstrated that their disparate treatment of Orloff was reasonable. Although the Commission declined to forbear from applying sections 201(b) and 202(a) of the Act in the CMRS context, [FN56] it has considered the existence of robust competition in the CMRS market when determining whether a violation of those sections has occurred. For example, in Kiefer v. PageNet, the Commission held that a fee imposed by a paging carrier on past due balances for paging service was not unreasonable under section 201(b) of the Act. [FN57] The Commission rejected the complainant's assertion that the late fee must be cost-based, noting, among other things, that the Commission has regulated CMRS "through competitive market forces," and that the existence of a competitive market in that case "did not warrant a finding that the late fee violate[d] section 201(b)." [FN58]

19. Orloff does not dispute that, at the time she took service from Defendants, consumers in the Cleveland, Ohio CMRS market had many choices. [FN59] In particular, consumers could obtain service from five facilities-based providers and from several resellers. [FN60] Carriers in that market regularly designed new service offerings to attract customers to their service and advertised the new packages and promotions to consumers. [FN61] Consequently, consumers had ample opportunity to compare various terms and conditions in order to identify the package best-suited to their needs. [FN62] In short, we conclude that vibrant competition characterized the Cleveland, Ohio CMRS market. [FN63]

20. Given the indisputable competition in the Cleveland CMRS market, we decline to find that Defendants' concessions practices violated section 202(a) of the Act, even if those practices allowed some consumers to negotiate better deals than other consumers. This is because we find that market forces protect Cleveland consumers from discrimination from these particular practices. We find that there is no evidence that any market failure prevented customers from switching carriers if they were dissatisfied. Accordingly, we find it unlikely that a carrier would have an incentive to engage in unreasonable discrimination where such conduct would result in a loss of customers. [FN64]

21. We are aware of case law holding that a carrier "will not be a common carrier where its practice is to make individualized decisions, in particular cases, on whether and what terms to deal." [FN65] This statement, however, articulates the "quasi-public character implicit in the common carrier concept" - i.e., that the carrier "undertakes to carry for all people indifferently." [FN66] Orloff does not allege that Defendants refused to deal with any segment of the public whose business is of the "type normally accepted."

[FN67] For example, Orloff does not contend that Defendants declined to serve any particular demographic group (e.g., customers who are of a certain race or income bracket). Indeed, Defendants' assertion that they are willing to engage in negotiations initiated by any customer is uncontroverted. [FN68]

22. In reaching our conclusion that a policy permitting all customers to haggle comports with section 202(a)'s reasonableness requirement, however, we emphasize two points. First, we are not forbearing from applying section 202(a) in this case. Section 202 continues to act as a powerful protection for CMRS consumers, even if it was not violated in this case. If a CMRS market were inadequately competitive, or if some other market failure limited consumers' abilities to use market forces to protect themselves, Section 202 could be implicated. [FN69] If, for example, a carrier unreasonably discriminated against rural consumers, who lacked adequate choice of providers, in favor of urban consumers, we could find a section 202 violation. It is also important to note that competition alone does not insulate a CMRS provider from section 202 liability. Even with adequate competition we will not hesitate to find that unreasonable discrimination violates section 202. Second, in a related vein, our holding of what is reasonable in this market does not necessarily translate to other markets marked by less competition.

23. We reject Orloff's contention that, in order to pass muster under section 202(a), a haggling policy must result in all customers who haggle being treated exactly the same. [FN70] By its very nature, a policy permitting customer negotiation will have outcomes depending, in part, on the ability of customers to identify the elements of service they desire and to bargain effectively for those elements. Although such a policy may not result in identical deals for

all consumers purchasing cellular service, we are confident that consumers, given the opportunity to purchase service from five facilities-based CMRS carriers and numerous CMRS resellers, [FN71] and given no evidence of other market failure, will "shop around," if they believe a particular carrier does not meet their needs. Moreover, although we agree with Orloff that the information available to customers about deals other customers received is not perfect, [FN72] she has not demonstrated that she was unaware of her ability to haggle or that Defendants somehow misled her in that regard. Indeed, it is undisputed that, during the relevant time period, CMRS providers in the Cleveland, Ohio, CMRS market actively advertised their plans and promotions in an effort to attract customers, [FN73] and that Orloff was aware that she had options beyond obtaining service from Defendants. [FN74] In fact, Orloff availed herself of the benefits of haggling, receiving numerous concessions from Defendants on two occasions. [FN75] We have not found in this case that information asymmetries rendered market forces in Cleveland unable to protect CMRS consumers.

24. We further disagree with Orloff's assertion that differences in treatment of consumers purchasing like service must be cost-justified on a transaction- by-transaction basis. [FN76] As noted above, the Commission has regulated CMRS though competitive market forces, declining to impose specific cost-based regulations on CMRS providers. [FN77] In any event, we find credible Defendants' assertion that their concessions practices stemmed generally from a rough profitability analysis, i.e., to respond immediately to changes in the marketplace and to individual customer demand when existing plans and promotions were inadequate. [FN78] Furthermore, we believe that, as a practical matter, it would be extraordinarily burdensome to require CMRS carriers to do what Orloff asks (i.e., to track

and offer to every customer concessions attained through negotiation). In the absence of evidence of market failure in the Cleveland, Ohio CMRS market, we decline to impose such a burden. [FN79]

2. Defendants' Concessions Practices Were Not Unreasonable Under Section 201(b) of the Act.

25. Section 201(b) of the Act requires a common carrier's charges and practices in connection with communication service to be "just and reasonable." [FN80] Orloff contends that Defendants' concessions practices constitute an unjust and unreasonable practice. [FN81] Defendants deny Orloff's allegations, offering the same defenses to the section 201(b) claim as they do to the section 202(a) claim. [FN82]

26. We reject Orloff's section 201(b) claim. As noted, section 201(b) declares unlawful only "unjust or unreasonable" common carrier practices. For the reasons discussed above, we find Defendants' concessions practices to be reasonable. [FN83]

B. Defendants' Occasional Departure from Association/Government Rate Plan Criteria is Tantamount to a Concession and, Therefore, is Reasonable.

27. Orloff argues that Defendants' occasional practice of allowing a person to obtain association/governmental entity rates, even though not a qualifying member, violates sections 201(b) and 202(a). [FN84] We disagree. First, the record contains no evidence that this conduct occurred in the Cleveland, Ohio MSA (as opposed to the Columbus, Ohio MSA). In any event, even if Orloff could show that Defendants engaged in this conduct in Cleveland, we would not find a violation of section 202(a) or 201(b). As Defendants observe, [FN85] allowing a non-member to

obtain an association/governmental entity rate is merely another way of granting a concession, which we have already concluded was a reasonable practice in the competitive Cleveland, Ohio CMRS market.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 202(a), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 202(a), and 208, that the Complaint filed by Jacqueline Orloff against Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, and New Par IS DENIED and that this proceeding IS TERMINATED as of the Release Date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

FN1. Vodafone AirTouch Licenses LLC has been renamed Verizon Wireless (VAW) LLC. Revised Joint Statement, File No. EB-01-MD-009 (filed July 3, 2001) ("Revised Joint Statement") at 3, ¶ 8. See Respondent's Answer, File No. EB- 01-MD-009 (filed May 3, 2001) ("Answer") at 1 n.1. New Par formerly operated under the trade name "Airtouch Cellular," and now transacts business under the trade name "Verizon Wireless." Answer at 1 n.1. See Revised Joint Statement at 2, ¶ 2. Although much of the conduct at issue in this proceeding occurred before the above changes, this Order refers to the parties individually as "Verizon Wireless (VAW) LLC" and "New Par," respectively, and refers to these entities collectively as "Defendants."

FN2. 47 U.S.C. § 208. The United States District Court for the Northern District of Ohio granted Defendants' request for a primary jurisdiction referral on May 30, 2000. See Jacqueline Orloff, et al. v. Vodafone AirTouch Licenses LLC, et al., Case No. 1: 00 CV 421, slip op. (N.D. Ohio May 30, 2000) ("District Court Order"), attached as Exhibit A to Answer. Almost eight months later, on January 24, 2001, Orloff filed a formal complaint with the Commission implementing the primary jurisdiction referral. However, because that complaint failed in numerous and significant respects to comply with the Commission's rules governing formal complaints, see 47 C.F.R. §§ 1.720-1.736, Commission staff dismissed the complaint without prejudice on February 1, 2001. See Letter from Alexander P. Starr, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff (dated Feb. 1, 2001). Over two months later, Orloff filed a new complaint, which is the subject of this Order. See Complaint for Declaratory Judgment Arising out of Class Action Complaint for Damages, File No. EB-01-MD-009 (filed Apr. 12, 2001) ("Complaint").

FN3. See 47 U.S.C. §§ 201(b), 202(a).

FN4. Revised Joint Statement at 3, ¶¶ 11-12; Complaint at 2, ¶ 6; Answer, Tab 1 (Respondent's Legal Analysis) at 2.

FN5. Revised Joint Statement at 2, ¶ 2; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 5, ¶ 9.

FN6. Revised Joint Statement at 2, ¶¶ 4, 6; at 3, ¶ 8; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 6, ¶ 10. Defendants argue that, because Verizon Wireless (VAW) LLC is not a licensed CMRS provider or a common carrier, it is not properly a party defendant. Supplemental Answer, File No. EB-01-MD-009 (filed May 29, 2001) ("Supplemental Answer") at 2; Answer,

Tab 1 (Respondent's Legal Analysis) at 1 n.1; Tab 2 (Respondent's Answer to Specific Allegations) at 95, ¶ 284. In light of our conclusion that the Complaint should be denied on the merits, we need not reach this issue. Cf. 47 U.S.C. § 411(a) (providing that interested non-carriers may be included as parties along with carrier defendants).

FN7. See Letter from Tejal Mehta, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff, and Kathleen M. Trafford and Kenneth D. Patrich, counsel for Defendants, File No. EB-01-MD-009 (dated May 29, 2001) at 3 ("May 29, 2001 Staff Letter"); Letter from Tejal Mehta, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff, and Kenneth D. Patrich, L. Charles Keller, J. Wade Lindsey, Kathleen M. Trafford, and Daniel W. Costello, counsel for Defendants, File No. EB-01-MD-009 (dated June 8, 2001) at 1 ("June 8, 2001 Staff Letter"); Letter from Tejal Mehta, Market Disputes Resolution Division, Enforcement Bureau, to Randy J. Hart and Mark Griffin, counsel for Orloff, and Kathleen M. Trafford and Kenneth D. Patrich, counsel for Defendants, File No. EB-01-MD-009 (dated July 16, 2001) at 2 ("July 16, 2001 Staff Letter').

FN8. The Commission uses MSAs, which the Office of Management and Budget defines based on population statistics, to allocate cellular radio licenses.

FN9. Revised Joint Statement at 2, ¶ 2; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 5, ¶ 9. See also May 29, 2001 Staff Letter at 3; June 8, 2001 Staff Letter at 1; July 16, 2001 Staff Letter at 2.

FN10. Revised Joint Statement at 4, ¶ 18; Answer, Tab 1 (Respondent's Legal Analysis) at 3. Cellular service, PCS, and SMR service utilize different spectrum frequency to

provide mobile telephony. The Commission regulates all three services as CMRS. See 47 C.F.R. § 20.9.

FN11. Revised Joint Statement at 4, ¶ 19; Answer, Tab 1 (Respondent's Legal Analysis) at 3.

FN12. Revised Joint Statement at 4, ¶ 20; Answer, Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Affidavit of Corinne Milligan) ("Milligan Affidavit"), Exhibits 1-65.

FN13. Revised Joint Statement at 4, ¶ 20; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 67, ¶ 156; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Milligan Affidavit), Exhibits 1-65.

FN14. Revised Joint Statement at 4, ¶ 20; Answer, Tab 1 (Respondent's Legal Analysis) at 21-22; Tab 2 (Respondent's Answer to Specific Allegations) at 51 and 67, ¶¶ 111, 158; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Milligan Affidavit), Exhibits 1-65.

FN15. Revised Joint Statement at 5, ¶¶ 24, 26; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 57 and 65, ¶¶ 133, 151; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer); Exhibit L (Milligan Affidavit), Exhibits 1-65.

FN16. Revised Joint Statement at 5, ¶ 25; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 60, ¶¶ 107, 142.

FN17. Revised Joint Statement at 5, ¶ 25; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 60, ¶¶ 107, 142.

FN18. Revised Joint Statement at 5-6, ¶ 28; Answer, Tab 1 (Respondent's Legal Analysis) at 4; Tab 2 (Respondent's Answer to Specific Allegations) at 70, ¶ 165.

FN19. Revised Joint Statement at 5-6, ¶¶ 28-29; Answer, Tab 1 (Respondent's Legal Analysis) at 3.

FN20. Revised Joint Statement at 6, ¶ 28; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 60, ¶ 142.

FN21. Revised Joint Statement at 6, ¶ 28; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 51, ¶ 16.

FN22. Revised Joint Statement at 6, ¶ 30; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 46, ¶ 04.

FN23. Revised Joint Statement at 7, ¶ 34; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 52, ¶ 19.

FN24. Revised Joint Statement at 7, ¶ 34; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 52, ¶ ¶ 106, 118.

FN25. Revised Joint Statement at 7, ¶ 35; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 47 and 52, ¶¶ 106, 118.

FN26. Complainant's Initial Brief in Support of Declaratory Judgment that Defendants Have Violated 47 U.S.C. §§ 201 and 202 (filed Aug. 17, 2001) ("Orloff's Initial Brief") at 22, 29-31; Complainant's Reply Brief in Support of Declaratory Judgment that Defendants Have Violated 47 U.S.C. §§ 201 and 202 (filed Sept. 17, 2001) ("Orloff's Reply Brief") at 2-3.

FN27. Revised Joint Statement at 5, ¶ 22; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 57 and 77, ¶¶ 135, 179.

FN28. Revised Joint Statement at 5, ¶ 22; Answer, Tab 1 (Respondent's Legal Analysis) at 18; Initial Brief of New Par and Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, File No. EB-01-MD-009 (filed Sept. 7, 2001) ("Respondent's Initial Brief") at 31. See Respondents' Answers to Complainant's July 9, 2001 Discovery Requests Propounded to Respondent New Par, File No. EB-01-MD-009 (filed July 27, 2001) ("Respondents" Answers to July 9, 2001 Discovery Requests"), Response to Request for Production of Documents No. 3 at NPV 170-173 (Ohio Association Program Packet); Response to Interrogatory No. 6.

FN29. Revised Joint Statement at 3, ¶¶ 10-11, 15; Complaint, Exhibit B (Orloff Service Agreement); Answer, Tab 1 (Respondent's Legal Analysis) at 2.

FN30. Revised Joint Statement at 4, ¶¶ 16, 17; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4, ¶ 6.

FN31. Revised Joint Statement at 3, ¶¶ 15-16; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4 and 44, ¶¶ 6, 95. The sales concessions consisted of a reduced rate on a new cellular telephone, waiver of the standard activation charge, one-half credit on the amount of the monthly access fee for a period of six months, and free weekend calling for three months. Revised Joint Statement at 3, ¶ 15; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4 and 44, ¶¶ 6, 95. The retention concession consisted of a billing credit. Revised Joint Statement at 4, ¶ 16; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 3-4 and 44, ¶¶ 6, 95.

FN32. Revised Joint Statement at 7, ¶ 40.

FN33. The putative class consists of at least 50,000 Ohio residents who purchased cellular service from Defendants two years prior to the filing of the federal district court complaint and who did not receive concessions. Complaint, Exhibit A (Jacqueline Orloff, et al. v. Vodafone AirTouch Licenses LLC, et al., Case No. 1:00 CV 421, Class Action Complaint (N.D. Ohio Feb. 11, 2000)). We note that the Commission cannot adjudicate complaints under section 208 on a class action basis. See Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp., Memorandum Opinion and Order, 13 FCC Rcd 22568, 22581, ¶ 29 (1998) ("class action lawsuits are neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act").

FN34. See District Court Order at 1.

FN35. District Court Order at 10. The District Court did not identify specific issues that it would like the Commission to resolve. See id.

FN36. Complaint at v.

FN37. Complaint at 42-50, ¶¶ 225-280. See Orloff's Initial Brief at 17-34; Orloff's Reply Brief at 3-14.

FN38. See Complaint at 42-49, ¶¶ 225-272.

FN39. See Complaint at 49-50, ¶¶ 276, 280.

FN40. Answer, Tab 1 (Respondent's Legal Analysis) at 5. See also Answer, Tab 1 (Respondent's Legal Analysis) at 6-13.

FN41. Answer, Tab 1 (Respondent's Legal Analysis) at 5. See also Answer, Tab 1 (Respondent's Legal Analysis) at 14-22.

FN42. 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . "). Persons engaged in the provision of CMRS are treated as common carriers under the Act. See 47 U.S.C. § 332(c)(1)(A).

FN43. See, e.g., Competitive Telecommunications Ass'n v. FCC, 998 F.2d 1058, 1061 (D.C. Cir. 1993); MCI Telecommunications Corp. v. FCC, 842 F.2d 1296, 1303 (D.C. Cir 1988); Cellexis International, Inc. v. Bell Atlantic NYNEX Mobile Systems, Inc., et al., Memorandum Opinion and Order, FCC 01-368, ¶ 10 (rel. Dec. 19, 2001); Beehive Telephone, Inc. v. Bell Operating Companies, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10567, ¶ 27 (1995); Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5903, ¶ 132 (1991).

FN44. See National Communications Ass'n, Inc. v. AT&T Corp., 238 F.3d 124, 129-30 (2nd Cir. 2001); Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Report and Order, 12 FCC Rcd 22497, 22615, ¶ 291 & n.782 (1997), recon. denied, 16 FCC Rcd 5681 (2001); PanAmSat Corp. v. Comsat Corp., Memorandum Opinion and Order, 12 FCC Rcd 6952, 6965, ¶ 34 n.90 (1997).

FN45. See Orloff's Initial Brief at 18; Defendants' Initial Brief at 20. Defendants argue that, "while all wireless service involves the sale of airtime, such airtime comes in a wide variety of packages, with airtime bundled in different

ways and coupled with many different types of features and services." Defendants' Initial Brief at 20. Nevertheless, Defendants state that they are willing to have the Commission assume in this proceeding that the CMRS service provided to Orloff was "like" the CMRS service provided to all other non-business customers. Id.

FN46. Revised Joint Statement at 6, ¶ 28; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 44, ¶ 95.

FN47. Revised Joint Statement at 7, ¶ 40. Contrary to Defendants' assertion (see Answer, Tab 1 (Respondent's Legal Analysis) at 17; Defendants' Initial Brief at 21), the fact that Orloff received some sales and retention concessions is not dispositive of the issue of disparate treatment, because Orloff did not receive other concessions that were provided to customers obtaining like service.

FN48. Answer, Tab 1 (Respondent's Legal Analysis) at 6-13, 22; Defendants' Initial Brief at 8-10; Defendants' Reply Brief at 3.

FN49. Answer, Tab 1 (Respondent's Legal Analysis) at 21-22; Defendants' Initial Brief at 2.

FN50. Defendants' Initial Brief at 22; Defendants' Reply Brief at 5.

FN51. Defendants' Reply Brief at 5. See also Defendants' Initial Brief at 22.

FN52. Complaint at 27-29, ¶¶ 146-153; Orloff's Initial Brief at 24-29; Orloff's Reply Brief at 3.

FN53. Complaint at 14-15, ¶¶ 60-65; Orloff's Initial Brief at 32; Orloff's Reply Brief at 7, 11, and 13.

FN54. Complaint at 43, ¶ 239; at 45, ¶ 249; at 49, ¶ 272; Orloff's Initial Brief at 22; Orloff's Reply Brief at 7-8.

FN55. Complaint at 24, ¶ 122; Orloff's Initial Brief at 22, 29-31; Orloff's Reply Brief at 2-3.

FN56. See Personal Communications Industry Association's Petition for Forbearance for Broadband Personal Communications Services, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998).

FN57. Kiefer v. Paging Network, Inc., d/b/a PageNet, Memorandum Opinion and Order, 16 FCC Rcd 19129 (2001) ("Kiefer v. PageNet").

FN58. Kiefer v. PageNet, 16 FCC Rcd at 19131, ¶ 5; at 19132, ¶ 7.

FN59. See Orloff's Initial Brief at 24; Orloff's Reply Brief at 3.

FN60. Revised Joint Statement at 4, ¶¶ 18, 19; Answer, Tab 1 (Respondent's Legal Analysis) at 3.

FN61. Revised Joint Statement at 4-5, ¶¶ 20, 24, 26. We have observed in the CMRS context that the continued rollout of differentiated pricing plans indicates a competitive marketplace. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report, 16 FCC Rcd 13350, 13377 (2001) ("Sixth Annual CMRS Competition Report").

FN62. Revised Joint Statement at 5, ¶¶ 24, 26; Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 57

and 65, ¶¶ 133, 151; Exhibit J (Wireless Telephone Advertisements from the Cleveland Plain Dealer).

FN63. We note that statistics at a national level regarding cellular service indicate continued downward pricing trends, steady customer churn rates, and continued expansion of mobile networks into new and existing markets. These factors suggest a high level of competition for mobile telephony users generally. See Sixth Annual CMRS Competition Report, 16 FCC Rcd at 13370, 13376-8.

FN64. See Answer, Tab 1 (Respondent's Legal Analysis) at 22; Defendants' Initial Brief at 13. See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1478, ¶ 173 (1994) (noting that non-dominant carriers are unlikely to behave anti-competitively because they recognize that such behavior would result in the loss of customers); Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1, 31, ¶ 88 (1980) (firms lacking market power cannot rationally price their services in contravention of Sections 201(b) and 202(a) of the Act because they would lose market share).

FN65. National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("NARUC I"). See also Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("[i]f the carrier chooses its clients on an individualized basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service"); National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976)

(quoting NARUC I); Complaint at 7, ¶ 24 (citing NARUC I, 525 F.2d at 641); Orloff's Initial Brief at 16 (same); Orloff's Reply Brief at 5 (same).

FN66. NARUC I, 525 F.2d at 641 (citations omitted).

FN67. NARUC I, 525 F.2d at 641 (citations omitted).

FN68. See note 51, supra.

FN69. With respect to CMRS, the Commission generally has relied on market forces, rather than regulation, except when there is market failure. See Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1478, ¶ 173 ("in a competitive market, market forces are generally sufficient to ensure the lawfulness of ... terms and conditions of service set by carriers who lack market power"); at 1478-79, ¶ 175 (forbearing from tariff requirements for CMRS carriers and noting that section 202 "will provide an important protection in the event there is a market failure") (emphasis added).

FN70. Orloff's Reply Brief at 9-10.

FN71. See Revised Joint Statement at 4, ¶¶ 18, 19.

FN72. See Orloff's Initial Brief at 32; Orloff's Reply Brief at 7, 11.

FN73. Revised Joint Statement at 5, ¶¶ 24, 26.

FN74. Revised Joint Statement at 3, ¶ 14.

FN75. Revised Joint Statement at 3-4, ¶¶ 15-16.

FN76. Orloff's Initial Brief at 33-34; Orloff's Reply Brief at 14.

FN77. See Kiefer v. PageNet, 16 FCC Rcd at 19131, ¶ 5.

FN78. See Answer, Exhibit C (Affidavit of Seamus Hyland) ("Hyland Affidavit"), at ¶¶ 35-38; Exhibit L (Milligan Affidavit), Exhibits 1-65; Respondents' Answers to July 9, 2001 Discovery Requests, Response to Request for Production of Documents No. 2 at NPV 102-103; Defendants' Initial Brief at 18; Defendants' Reply Brief at 4.

FN79. Again, we emphasize that our ruling is confined to the facts of this case, which involve a highly-competitive CMRS market occupied by a number of non-dominant carriers. Consequently, the cases cited by Orloff (see Orloff's Initial Brief at 27-28; Orloff's Reply Brief at 11) are distinguishable, because they all involved carriers with significant market power. See MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 41 (D.C. Cir. 1990); Southwestern Bell Telephone Co., Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 6964, 6967, ¶ 8 (1998); AT&T Communications Tariff F.C.C. Nos. 1, 2, 9, Memorandum Opinion and Order, 6 FCC Rcd 5675, 5675, ¶ 6 (1991).

FN80. 47 U.S.C. § 201(b).

FN81. Complaint at 49, ¶ 275; Orloff's Initial Brief at 23; Orloff's Reply Brief at 3.

FN82. See Answer, Tab 2 (Respondent's Answer to Specific Allegations) at 2, ¶ 2; Defendants' Initial Brief at 24, 31.

FN83. Orloff asserts for the first time in her opening brief that Defendants' public position that they do not grant concessions is an intentional misrepresentation in violation of section 201(b). Orloff's Initial Brief at 32. We decline to

address this misrepresentation claim, because Orloff did not raise it in her complaint. Thus, we find that the record provides an inadequate basis on which to properly assess the merits of the argument. See, e.g., AT&T Corp. v. Jefferson Telephone Co., Memorandum Opinion and Order, 16 FCC Rcd 16130, 16133 n.18 (2001) (declining to address an issue raised for the first time in the brief).

FN84. See Complaint at 46-48, ¶¶ 258, 259, 263, and 267; Orloff's Initial Brief at 21. Orloff also argues that it is discriminatory for Defendants to bill customers participating in Association/Government rate plans directly for services, rather than billing the affiliated entity. Complaint at 46-47, ¶¶ 254-259. Because Orloff offers no legal support for this contention, we dismiss this aspect of her claim.

FN85. Answer, Tab 1 (Respondent's Legal Analysis) at 18; Defendants' Initial Brief at 32.